



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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Application of James Kleist for a Permit to  
Remove Material from the Bed of Wind Lake,  
Town of Norway, Racine County, Wisconsin

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Case No.: 3-SE-98-0628

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

Mr. James Kleist, 24819 West Loomis Road, Wind Lake, Wisconsin 53185, applied to the Department of Natural Resources for a permit pursuant to sec. 30.20, Stats., to remove materials from the bed of a pond connected to Wind Lake, in the NW ¼ of the SE ¼ of Section 4, Township 4 North, Range 20 East, Town of Norway, Racine County, Wisconsin.

On October 22, 1998, the Department of Natural Resources denied the application and determined that the proposed project would be detrimental to the public interest in Wind Lake.

On November 12, 1998, the Department received a request for a contested case hearing pursuant to sec. 227.42, Stats., from Mr. Kleist. On May 16, 2000, the Division of Hearings and Appeals received a Request for Hearing from the Department.

Pursuant to due notice hearing was held on July 12, 2000, at Sturtevant, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael Cain  
P. O. Box 7921  
Madison, WI 53707-7921

James J. Kleist  
24819 West Loomis Road  
Wind Lake, WI 53185

### FINDINGS OF FACT

1. Mr. James Kleist, 24819 West Loomis Road, Wind Lake, Wisconsin, 53185, completed filing an application with the Department for a permit under sec. 30.20, Stats., to remove materials from the bed of a pond connected to Wind Lake, Town of Norway, Racine County. The Department and the applicant have fulfilled all procedural requirements of secs. 30.20 and 30.02, Stats.

2. The applicant owns real property located in the NW ¼ of the SE ¼ in Section 4, Township 4 North, Range 20 East, Racine County. The above-described property abuts a pond connected to Wind Lake, which is navigable in fact at the project site. The pond itself is also navigable at the project site.

3. The applicant proposes to dredge a pond connected to Wind Lake. There is significant erosion in the area between the pond and Wind Lake. Dredge spoils from the pond would be used for bank stabilization around the pond and the Wind Lake—Muskego Canal (the Canal), which abuts the applicant's property. The pond is shallow, and there is a small island in the center. The applicant owns a five acre parcel which abuts Wind Lake at the southern edge, and the Wind Lake—Muskego Canal on the east. There is a one acre wild life pond between the area abutting Wind Lake and the balance of the applicant's five acre lot. The pond is approximately 20 to 30 feet north of the lake. It is even closer to the Wind Lake—Muskego Canal, which is just five to six feet east of the pond.

4. The purpose of the proposed dredging is part of a reconfiguration of the pond to prevent future erosion in the area. Further, the placement of dredge spoils on the banks is intended to ameliorate the impacts of past erosion in the area. The applicant is concerned that continued erosion will create two problems: 1) it will make it difficult for him to access the lake through the riparian strip of land between the pond and the canal; and 2) that, ultimately, the pond will be directly connected to the navigable waters of the canal and/or lake.

On the west side of the applicant's property, the pond prevents him from gaining access to the lake. Part of the pond reconfiguration would involve the dredging of the west side of the pond to provide a 20-foot wide strip passage to the lake. (Ex. 21) The applicant stated at the hearing that he is willing to drop that part of the project, which he estimated constituted one fourth to one third of the total dredging proposal, which involves approximately 3500 cubic yards. The applicant is far more interested in preventing erosion on the east side of the pond near the Canal. The proposed dredging would create a 25-foot distance between the pond and the Canal. The reconfigured pond would be significantly smaller, 20 feet of water on either side being lost. The reconfigured pond would be approximately .96 acres. (Ex. 21)

5. The proposed dredging and reconfiguration of the pond would not be consistent with public rights and interests in Wind Lake.

6. The proposed dredging would degrade the ecological value of the pond to wildlife. The pond has a "high" value to wildlife, because of its diverse vegetation. The pond supports a large amount of high quality emergent, floating and submergent aquatic vegetation.

This high quality habitat is used by waterfowl, amphibians, and aquatic vertebrates and invertebrates. (Wakeman) The proposed dredging and reconfiguration of the pond will have a detrimental impact upon the very high quality habitat used by waterfowl, amphibians, fish, aquatic vertebrates and invertebrates, as well as the emergent, floating and submergent wetland vegetation. Even if the applicant foregoes creating the 20-foot wide strip of land on the west side, there will still be a significant loss of pond area and wetland fringe plants as a result.

Further, the use of dredge spoils to widen or reinforce the banks of the pond and canal will likely erode back into the pond and canal resulting in sedimentation and additional loss of habitat. (Roblek, Wakeman)

The proposed dredging is not consistent with public rights in maintaining wildlife habitat values in the waters involved.

7. The proposed dredging would have a detrimental impact upon fishery values in the area. (Roblek) Wind Lake supports a diverse fishery, including yellow perch, northern pike and various minnow species. If the pond is dredged and reconfigured, there is a significant risk that water levels would drop low enough to prevent trapped fish from leaving the pond. (Ex. 38) Yellow perch and northern pike both spawn in the pond, but the proposal would not have a significant impact on spawning habitat on Wind Lake.

8. The proposed dredging does not comply with water quality standards set forth in Chapter NR 103, Wis. Admin. Code. The project is not wetland dependent. There are practicable alternatives to the proposed dredging and pond reconfiguration. The DNR did not dispute the erosion in the area was a problem, and stated that it would favorably consider an appropriate use of riprap and some type of retaining wall in the area. The DNR has seldom approved retaining walls in recent years. (Roblek) However, given the significant erosion experienced by the applicant, the Department has indicated that it would be willing to work with him to approve an appropriate retaining wall on the eastern strip of land near the canal.

The applicant presented an estimate that a sheet pile wall would cost over \$350,000. (Ex. 17) Ms. Schumacher testified that this represented far more than Mr. Kleist needed to spend to achieve his goal of preserving his access to the lake and preventing the pond from becoming a part of the canal. Use of riprap and stabilizing vegetation would significantly reduce the estimated cost. (Schumacher) Further, the applicant presented only a single written estimate and did not provide corroborating live testimony demonstrating the estimate was reasonable and necessary. Without such testimony, the record does not contain a sufficient factual basis to determine that the cost of a retaining wall adequate to prevent further erosion would be prohibitive.

A second, less costly alternative would be to place a boardwalk to allow a walkway passage to the applicant's riparian zone. The applicant stated his belief that boats would pass over a boardwalk, but this seems extremely unlikely. Certainly, a combination of rip-rap, a retaining wall and boardwalk could meet the applicant's needs without a significant impact on wetlands.

9. The proposed dredging would have a significant detrimental impact upon the functional values of the high-quality wetland associated with the wildlife pond. The proposed project will result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences. Specifically, dredging and reconfiguration of the pond and associated wetlands will destroy habitat used by wildlife and vegetation as well as increase the amount of sedimentation entering the Wind Lake system. (Roblek)

10. The Southeast Wisconsin Regional Planning Commission (SWRPC), has designated the area as a class one habitat, of high quality, and as part of a permanent "primary environmental corridor." (Ex. 41) Accordingly, the project area constitutes an "environmentally sensitive area and environmental corridor" within the meaning of sec. NR 103.04(4), Wis. Admin. Code. The area is thus a wetland in an "area of special natural resource interest" within the meaning of sec. NR 103.02(1), Wis. Admin. Code. The proposed dredging would have a detrimental impact on this protected "area of special natural resource interest."

### DISCUSSION

The applicant believes that significant erosion has been caused by the dredging of the Wind Lake/Muskego Canal. Because the DNR approved the dredging, the Applicant has had conflicts with the Department regarding the canal dredging. However, the cause of the erosion is not an issue for this hearing. The only issues are whether the project meets the requirements of sec. 30.19 and 30.20, Stats.

The applicant has demonstrated, and the Department does not dispute, that there is significant erosion on the narrow strip of land between the pond and the canal. However, the proposed dredging and pond reconfiguration is not the best way to deal with this problem. There was undisputed expert testimony that the dredging would seriously damage a wetland "area of special natural resource interest."

The DNR has indicated a willingness to approve some combination of a retaining wall and riprap. While the applicant has legitimate concerns about erosion, he needs to set aside past conflicts and work with the Department to develop a plan that does not have significant impacts upon the waters and wetlands involved.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and to issue necessary orders in cases involving the removal of materials from the beds of waterways pursuant to secs. 227.43(1)(b) and 30.20, Wis. Stats.

2. The applicant has the burden of proof in an application for a permit under Ch. 30, Stats. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 412 N.W.2d (Wis. Ct. Appt.

1987) The applicant has not carried his burden of demonstrating that the proposed project is consistent with public rights in the water involved.

3. Section 30.20(1)(b), Stats., reads, "No person shall remove any material from the bed of any lake or stream not mentioned in par. (a) without first obtaining a permit from the department under sub. (2)(c)." Paragraph (a) refers only to navigable lakes and outlying waters of the state. Therefore, by the plain language of the statute, paragraph (b) must cover non-navigable lakes and navigable and non-navigable streams. Dwyer v. State, 91 Wis. 2d 440, 443, 283 N.W.2d 448 (Wis. Ct. Apps. 1979) Accordingly, the DNR and the Division have authority to require a permit for the proposed dredging. Further, the project also involves dredging and grading within 500 feet of Wind Lake, requiring a permit under sec. 30.19(1)(a), Stats.

4. A permit to remove material from the bed of a non-navigable lake or stream may be issued if issuance is consistent with the public interest in the water involved. Sec. 30.20(2)(c), Wis. Stats. The proposed dredging is not consistent with the public interest in the wild life pond, nor with the public interest in Wind Lake.

5. The applicant has not demonstrated that the proposed dredging "will not injure public rights or interest, including fish and game habitat", within the meaning of sec. 30.19(4), Stats.

6. The proposed project is an "area of special natural resource interest" within the meaning of sec. NR 103.02(1) and NR 103.04(4), Wis. Admin. Code.

7. The proposed dredging and reconfiguration of the wildlife pond is not a wetland dependent activity within the meaning of sec. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Admin. Code.

8. Practical alternatives to the pond reconfiguration proposal exist which will not adversely impact wetlands and will not result in other significant environmental consequences. sec. NR 103.08(4)(a)(2) Wis. Admin. Code. Practical alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. Sec. NR 103.07(1), Wis. Admin. Code. Taking the above factors into consideration, the applicant has not shown why he could not prevent erosion with some combination of riprap or a retaining wall or build a boardwalk.

9. The project does not meet the requirements of sec. NR 103, Wis. Admin. Code because there are practical alternatives which will not adversely impact wetlands and will not result in significant adverse environmental consequences. Sec. NR 103.08(4)(a), Wis. Admin. Code.

10. The project proponent has not shown that the activity will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences within the meaning of sec. NR 103.08(4)(b), Wis. Admin. Code.

11. The DNR has met the procedural requirements relating to sec. 1.11, the Wisconsin Environmental Policy Act.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the permit application be DENIED.

Dated at Madison, Wisconsin on August 4, 2000.

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DIVISION OF HEARINGS AND APPEALS  
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By: \_\_\_\_\_  
Jeffrey D. Boldt  
Administrative Law Judge

### NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.